No. 81945-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

---

In re the Custody of E.A.T.W. and E.Y.W.

VITO & YASUKO GRIECO

Petitioners

and

SACHI T. WILSON

Respondent



---

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

---

# RESPONDENT'S SUPPLEMENTAL BRIEF

---

PATRICIA NOVOTNY
3418 NE 65th Street, Suite A
Seattle, WA 98115
206-525-0711

NANCY HAWKINS
6814 Greenwood Avenue, N.
Seattle, WA 98103
206-781-2570

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Washington Cases

**Statutes, Rules & Other Authorities**

## A. INTRODUCTION

In this case the court is asked to interpret an adequate cause provision recently added to the nonparental custody statute (RCW 26.10.032). The provision is virtually identical to the adequate cause provision in the parenting plan modification statute (RCW 26.09.270), enacted in 1973. Unremarkably, Division One gave the new provision the same meaning as its counterpart.

The insertion of this provision in the nonparental custody statute came after complaints about burdening parents and children with useless hearings in nonmeritorious nonparental custody actions. *See, e.g., In re Custody of Nunn,* 103 Wn. App. 871, 14 P.3d 175 (2000). The provision, like its counterpart in the modification statute, interposes a substantive threshold as a mechanism for expediently dismissing nonmeritorious petitions. Thus, nonparental custody petitioners now must satisfy two prerequisites to having a trial on the merits. As before, they must establish standing by demonstrating either that the child is not in a parent's custody or that neither parent is a suitable custodian. And, now, they must also establish prima facie their ability to prevail on the merits, that is, their ability to prove the parents are unfit or actual detriment to the children if placed in their parents' custody.

## B. ISSUES PRESENTED

1. To satisfy adequate cause in a nonparental custody proceeding, must petitioners establish prima facie facts that would support relief on the merits, not merely that the chlldren are not in the parent's custody, which satisfies the statute's standing requirement? In other words, must the petitioners "set forth factual allegations that if proved would establish that the parent is unfit or the child would suffer actual detriment if placed with the parent," as Division One held?

2. Is dismissal the remedy for failure to satisfy adequate cause?

3. If the Court of Appeals strikes a report of proceedings from the record on review, may the petitioner properly cite to it as part of the record on review?

## C. STATEMENT OF THE CASE

The two children of Joann Grieco and Sachi Wilson are the subject of these proceedings. The children are now aged 13 and 18. Their parents separated in August, 2002, but did not divorce. CP 21-22, 76-79. Though the relationship of the adults had changed, and the children remained in the mother's home, the

father's intention to continue to be an involved parent never wavered. CP 76.

In 2003, Wilson filed for divorce. CP 77. Subsequently, Grieco suffered a recurrence of cancer and, in consideration of her illness, Wilson ceased the effort to formalize the marital dissolution; consequently, no parenting plan or child support order was entered. CP 76-77. The mother's parents, Vito and Yasuko Grieco, moved in with her and the children. The Griecos were furious with Wilson and, along with their daughter, they frustrated, resisted, and obstructed the father's access to and involvement with the children. CP 76-79. In the face of this hostilty, and fearful of losing access to the boys, Wilson again filed for dissolution. CP 78. Shortly after that, late in 2004, the mother died. CP 78.

Pressured by the grandparents, and to spare the children another disruption so soon after their mother's death, Wilson reluctantly agreed to leave the children temporarily in their mother's home under the care of the grandparents. CP 79. Wilson took measures appropriate to ensuring that the children were fully protected while in the care of their grandparents, authorizing the Griecos to act in loco parentis in respect of medical care, etc. CP 10-11, 13-14, 16-20. However, Wilson "never intended this to be a

permanent step," but, rather, "a transition over time," which ultimately would lead to the children residing with him. CP 79.

The Griecos continued their efforts to obstruct Wilson's relationship with the children. CP 79-81. In October 2006, the grandparents filed a petition for nonparental custody, which the father opposed. CP 1-7, 68-71. The grandparents alleged adequate cause as follows:

> The children have not been in the physical custody of either parent since the death of their mother on 10/29/04. Father left the family home in 8/02. The children have been in custody of the grandparents/de facto parents since at least July 2003 and in the sole custody of the grandparents/de facto parents since the death of their natural mother 10/29/04.
>
> The parties agreed that the children should reside with the petitioners and signed an agreement dated February 2, 2006.

CP 6. The agreement to which the Griecos make reference does not specify a duration, and, in any case, bears no incidents of irrevocability. CP 26-30. In neither their petition nor supporting affidavits did they allege more than appears here, i.e., they did not allege detriment to the children from placement with the father or that the father was unfit. Rather, the Griecos relied solely upon the fact that the children had been in their custody for an extended period of time. See, e.g., CP 23.

To the trial court, the grandparents argued the fact that the children are not in the physical custody of either parent "alone is sufficient adequate cause for the third party custody action to go forward." CP 50. The trial judge agreed with the Griecos and found adequate cause solely on the basis that the children are not in the custody of the parents. The court ruled:

> Court only needs to find, under 26.10, that children are not in the custody of parents to find adequate cause.

CP 60-61. The court also ruled that the:

> Court cannot determine issues based on written materials; trial is necessary.

CP 61.

Wilson filed a timely Notice of Discretionary Review from the court's order (CP 62-66), which Division One granted. Division One then granted Wilson his requested relief of dismissal. The appellate court observed:

> In the motion and declaration for adequate cause, the Griecos did not allege actual detriment. The Griecos only alleged that the children have lived with the Griecos since 2004 and that Wilson agreed in February 2006 that the children should continue to live with their grandparents. The Griecos argued that the fact the children were not in the physical custody of Wilson "alone is sufficient adequate cause for the third party custody action to go forward." The Griecos also argued the father was not a "suitable custodian"

> because he voluntarily left the children with their grandparents "for an extended period of time." The declarations do not allege facts that, if proved, would establish actual detriment in placing the children with their father.

*Grieco v. Wilson* 144 Wn. App. 865, 872, 184 P.3d 668 (2008). The court interpreted the new provision in the statute to require of the petitioner a substantive threshold showing, as does the nearly identical provision in the modification statute, RCW 26.09.270. 144 Wn. App. at 874-875. Thus, the court held, in addition to establishing standing (i.e., that the child is not in the physical custody of a parent or that neither parent is a suitable custodian), the nonparental custody petitioner "must set forth factual allegations that if proved would establish that the parent is unfit or the child would suffer actual detriment if placed with the parent." *Id.,* at 875. Because the Griecos failed to meet this standard, the court ordered their petition dismissed.

Almost contemporaneously, Division Three came to a contrary interpretation of the adequate cause requirement. *In re Custody of BJB,* 146 Wn. App. 1, 7-10, 189 P.3d 800 (2008). Division Three held that satisfying the standing requirement also satisifes adequate cause; that is, the requirement is met by a showing that the child is not in the custody of a parent or that

neither parent is a suitable custodian. 146 Wn. App. at 9. Thus, the court found adequate cause in the parties' stipulation that the children were not in either parent's custody. *Id.*

The Griecos petitioned for review, which this Court granted.

## D. ARGUMENT

### 1. THE ADEQUATE CAUSE THRESHOLD REQUIRES MORE THAN PROOF OF STANDING. IT REQUIRES PRIMA FACIE PROOF OF THE MERITS.

Wilson proceeds first from the straightforward principle that the Legislature intended some change to the nonparental custody procedure when it added the adequate cause provision. The need for the provision was identified most vigorously in *In re Custody of Nunn, supra,* where a parent and child endured months and months of separation and intrusion, including an investigation and trial, despite that there was no basis for nonparental custody.[1] To prevent such calamities in the future, the appellate court in *Nunn* held that petitioners must establish some merit as a threshold. 103 Wn. App. at 874.

Subsequently, the Legislature embraced this standard, which proved especially fortuitous since this Court later repudiated

[1] The facts of *Nunn* also echo the facts here, where relatives of a deceased custodial parent vigorously seek to undermine the surviving parent's relationship with the children.

the *Nunn* court's interpretation of the statute, clarifying that the procedural standing requirement remains separate from the substantive custody question. *In re Custody of Shields,* 157 Wn.2d 126, 139, 136 P.2d 117 (2006) ("... the [*Nunn*] court misdirected its concern and set up a substantive standing requirement, which is really a concern about the merits.").

However, acting several years before *Shields*, the Legislature added to the statute the threshold showing mandated by *Nunn* with language borrowed from the modification statute. RCW 26.10.032. *See* H.B. Rep. on H.B. 1720, at 2, Reg. Sess. (Wash.2003), available at http://dlr.leg.wa.gov/billsummary/default.aspx?year=2003&bill=1720 (attached). Legislative sponsors testified that "[p]arents in a third party custody proceeding should not have to wait all the way until a trial before finding out that the case should have been dismissed." *Id.* Accordingly, the Legislature added to the staute "[a] procedure for a threshold hearing, as discussed in case law and similar to hearings used in other family law proceedings[.]" *Id.*

Indeed, the nonparental custody provision tracks almost identically, in structure and text, the modification statute. The nonparental custody statute provides:

> (1) A party seeking a custody order shall submit, along with his or her motion, an affidavit declaring that the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian and setting forth facts supporting the requested order. The party seeking custody shall give notice, along with a copy of the affidavit, to other parties to the proceedings, who may file opposing affidavits.
>
> (2) The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order should not be granted.

RCW 26.10.032. The modification statute provides:

> A party seeking a temporary custody order or a temporary parenting plan or modification of a custody decree or parenting plan shall submit together with his motion, an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other parties to the proceedings, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

RCW 26.09.270.

The similarity in text is significant. When the same words are used in different parts of the same statute, this Court presumes the Legislature intended the words to have the same meaning. *Timberline Air Service, Inc. v. Bell Helicopter-Textron, Inc.,* 125 Wn.2d 305, 313, 884 P.2d 920 (1994). With the same logic, judicial

interpretation of the text in one statute should apply with equal force to the same text in another statute. *See Green River Comm'ty College Dist. No. 10 v. Higher Educ. Personnel Bd.,* 95 Wn.2d 108, 117, 622 P.2d 826 (1980) (a similar interpretation should result where the language of the two statutes is similar).

Properly, then, Division One examined case law interpreting the modification provision. *Grieco v. Wilson,* 144 Wn. App. at 874-875. This precedent makes clear that the adequate cause threshold is a substantive one and requires a petitioner to set forth "'something more than prima facie allegations, which, if proven, might permit inferences sufficient to establish grounds for a custody charge.'" *In re Marriage of Lemke*, 120 Wn. App. 536, 540, 85 P3d 966 (2004). By means of this gate-keeping mechanism, useless and harassing hearings on modification petitions are prevented. *In re Marriage of Adler,* 131 Wn. App. 717, 724, 129 P.3d 293 (2006).

The same principles apply here, but with special force because of the constitutional protections afforded parents involved in disputes with nonparents. *In re Custody of Smith,* 137 Wn.2d 1, 13-14, 969 P.2d 21 (1998). For nonparental custody, the petitioner must prove either (1) the parent is unfit, or (2) actual detriment to the child's growth and development from placement with an

otherwise fit parent. *In re Custody of Shields,* 157 Wn.2d 126, 136 P.2d 117 (2006). This heightened standard protects against unwarranted state interference with a fit parent's parenting decisions. *Id.,* at 144. Thus, to establish adequate cause to proceed to a trial on a nonparental custody claim, a petitioner must establish in affidavits "something more than prima facie allegations" that, if proven, would meet this substantive standard. To interpret the statute as urged by the Griecos and accepted by the trial court renders the additional language superfluous and, of course, places it at odds with the meaning given the same language in the modification context.

In sum, the Legislature set out to enshrine the protections deemed necessary by the court in *Custody of Nunn.* Division One properly gave to the Legislature's effort the meaning necessary to accomplish that purpose.

2. THE REMEDY FOR FAILURE TO SATISFY ADEQUATE CAUSE IS DISMISSAL.

The Griecos would like a "do over" of the adequate cause threshold and cite *Shields*, 157 Wn.2d at 149-50, as support for this proposition. Petition, at 17. But *Shields* dealt with an error at trial, not a failure to satisfy a threshold devised specifically to weed out

meritless cases. Thus, contrary to the Griecos' claim, the controlling authority dictates dismissal as the remedy. *See, e.g., Lemke,* 120 Wn. App. at 541-542 (reversing trial court grant of adequate cause where facts were insufficient and distinguishing *In re Parentage of Jannot,* 149 Wn.2d 123, 65 P.3d 664 (2003)). This is the only sensible outcome for several reasons.

First, it is an abuse of discretion to grant relief where the facts do not satisfy the legal standard, as is the case here. *See In re Marriage of Littlefield,* 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (court's decision is based on untenable grounds if the facts do not meet the requirements of the correct standard).

Second, the adequate cause proceeding is similar to summary judgment, CR 56, except that it is mandatory. Like summary judgment, the adequate cause threshold is designed to avoid a useless trial. *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980). The adequate cause threshold requires the petitioner to make a preliminary showing of facts which, if proven, would justify nonparental custody. Thus, the court is presented with a mixed question of law and fact. In such cases, on summary judgment, this Court views whether the facts justify relief as a matter of law. *Chaplin v. Sanders,* 100 Wn.2d 853, 863,

676 P.2d 431 (1984) (adverse possession is mixed question of fact and law). Similarly, here, the question is whether the facts offered by the petitioners would, if proven and *as a matter of law*, justify nonparental custody. In reviewing the trial court's decision and the Griecos' pleadings, Division One was completely competent to answer that question.[2]

Of course, the Griecos disagree, and allege that the Court of Appeals "improperly usurped the role of the trial court" by dismissing their custody petition outright, relying on *Jannot* for the proposition that remand is required. Petition, at 16-17, 19. However, as observed in *Lemke*, this Court's application of a more deferential standard to a trial court's denial of adequate cause is distinguishable from a decision granting adequate cause, and for reasons that go directly to the purpose of the adequate cause mechanism. As Division Three noted:

> *Jannot*...did not hold or imply that a trial court has discretion to grant a hearing even if the movant's affidavits do not show evidence that is sufficient...

*Marriage of Lemke,* 120 Wn. App. at 542.[3]

---

[2] As recently observed, considerable debate can occur over the deference due trial courts in different contexts. *Yousoufian v. Office of Sims,* 165 Wn.2d 439, 462-463, 200 P.3d 232 (2009) (Chambers, J., concurring).

[3] Judge Morgan authored *Lemke* and concurred, sitting *pro tem*, in *Jannot.*

Importantly, *Jannot* emphasizes the need for quick resolution of custody disputes – an interest that would be defeated by remand for reconsideration of the Griecos' facially inadequate petition. 149 Wn.2d at 127-28. Indeed, this Court noted in *Jannot* that "extended litigation can be harmful to children." *Id.* at 128. Thus, where a trial court denies a hearing on nonparental custody, de novo review by the appellate court could prolong litigation. *Id.* at 127 (because 'the emotional and financial interests affected by such decisions are best served by finality, and de novo review may encourage appeals') (internal citations omitted).

Here, the petitioners failed to allege, either in their complaint or their adequate cause motion (CP 1-7, 21-24), that Wilson is an unfit parent or that placement with Wilson would be detrimental to the children. Thus, remand of this legally insufficient petition would undermine *Jannot's* expressed interest in finality. Likewise, remand would countermand the legislative purpose, articulated in *Custody of Nunn*, that a threshold inquiry

> should be made as early as is practicable under the circumstances of each case, so as to minimize unwarranted state interference with the integrity of the family.

House Bill Report, HB 1720, at 2. Already, for nearly two years, Wilson and the children have been suspended in legal limbo because of a facially inadequate nonparental custody petition, which Division One properly dismissed under the statutory authority. In any case,

Finally, the Griecos complain about Division One holding them to the substantive standard for nonparental custody articulated in *Shields*, and they do so by mischaracterizing the proceedings in both court levels below. Petition, at 12-13. They complain that

> Division One ignored the potential detriment that would result from removing the children from the care of their grandparents, with whom they have lived for the past five years, instead improperly requiring that any detriment be the result of a noncustodial parent's deficiencies.

Petition, at 12. This statement is simply inaccurate. The Griecos fail to mention that they did not even allege detriment, let alone attempt to prove it. Certainly, it is not reasonable to require the courts to infer elements the petitioners themselves fail to plead and prove.

Because of the Griecos' failure to plead detriment, this case simply does not present the question of whether detriment may be

proved merely by proving the children have been in a nonparent's care for some period of time. In any case, surely this Court would not agree with the Griecos' claim, nor is that claim supported by the authorities they cite. Petition, at 12. In both cited cases, much more is going on than mere separation of parent from child. In *Marriage of Allen,* 28 Wn. App. 637, 648, 626 P.2d 16 (1981), the child was deaf and only his stepmother had taken the necessary actions to accommodate the impairment (e.g., incorporating sign language into the family). There is no such special need here. *See, also, In re Mahaney,* 146 Wn.2d 878, 894, 51 P.3d 776 (2002) (mother's prior unfitness left children with special needs mother could not meet). Likewise, *Custody of Stell,* 56 Wn. App. 356, 368, 783 P.2d 615 (1989).

In short, this case never turned on whether Wilson is fit or whether reuniting parent and children in this case would be detrimental to the children. Nor, in any event, do the authorities cited allow a court to find detriment from the mere fact of separation, which is only sensible given that parents must, of necessity at times, leave their children in another's care. Finally, even if this were not all true, it hardly would be fair in this case to

allow the Griecos, through their obstructionism, to manufacture a basis for nonparental custody.

### 3. THE REPORT OF PROCEEDINGS, TO WHICH PETITIONER CITES, IS NOT PART OF THE RECORD ON REVIEW.

Months after Division One granted Wilson's motion for discretionary review, the Griecos unsuccessfully attempted to "do over" the adequate cause hearing in the trial court, from which hearing a transcript was prepared. In this hearing, the trial judge commented on the written order entered months previously and, by then, the subject of appellate review. The court's comments were inconsistent, both supportive of the Griecos' position and adverse to their position. In their petition for review, the Griecos selectively cite the former. Petition, at 8. They do not mention that the trial court also stood by its written order that adequate cause was satisfied if the children were not in the parent's custody. RP 20-21.

Regardless, Division One ordered the report of proceedings stricken. *Grieco v. Wilson,* 144 Wn. App. at 872. Accordingly, it is not part of the record on review and petitioners should not cite it at all. RAP 9.1(b) and 10.3(a)(5).

## E. CONCLUSION

For the foregoing reasons, Sachi Wilson asks this Court to affirm the decision of the Court of Appeals and to remand this matter to the superior court for dismissal of the nonparental custody petition.

Dated this 30th day of March 2009.

RESPECTFULLY SUBMITTED,

_____

PATRICIA NOVOTNY, WSBA #13604
Attorney for Respondent